Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

RAMON MARTINEZ AND RODOLFO RAMIREZ,
PETITIONERS

VS.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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January 18, 1994

PET1:PETITION

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FIRST QUESTION PRESENTED FOR REVIEW

After the trial court refused to instruct the jury "on the methods of proving knowledge," petitioners were denied constitutional due process when the court of appeals found (Pet.App. 20-21) in effect that in lieu of the trial court's obligations under F.R.Cr.P. 30, defense counsel effectively instructed the jury on the law "on the methods of proving knowledge", since what the lawyers say "does not count if different from the judge's law", for the court instructed the jury that it is the trial court's job to instruct the jury on the law that applies in the case (Pet.App. 56; 15R p. 973, lines 15-16) and "[w]hat the attorneys say is not binding on you" and a lawyer's statements are "not evidence in the case" (Pet.App. 57; 15R p. 976, lines 15-16, 22-23).

SECOND QUESTION PRESENTED FOR REVIEW

By finding no harmful error, the court of appeals affirmed the convictions in the face here of reversible error under the implications of Giglio v. U.S., 405 U.S. 152 (1972), where

a. on opening statement defense counsel was judicially prohibited from discussing law relevant to accomplice Javier Guerra's credibility (Point of Error No. 3 at CA5);

b. on cross-examination of the Government's main witness Javier Guerra, defense counsel was judicially prohibited from inquiring about law relevant to Javier Guerra's credibility (Point of Error No. 4 at CA5);

c. although requested, the trial court refused to instruct the jury on that requested law relevant to Javier Guerra's credibility; and

d. where the jury did not learn from the

court

1. that the trial prosecutor's boss, the U.S. attorney, had the exclusive right to decide whom to charge, prosecute and put to trial (Point of Error No. 6 at CA5);
2. when it is a federal offense to lie to a federal officer as Javier Guerra had done (Point of Error No. 7 at CA5);
3. when it is a federal offense to money launder as Javier Guerra had done (Point of Error No. 8 to CA5); and
4. that before departure, Javier Guerra's guideline sentencing range was to be between 78 and 90 months incarceration (Point of Error No. 9 at CA5).

LIST OF ALL PARTIES BELOW

The original parties before the United States Court of Appeals for the Fifth Circuit were the United States of America and Petitioners Ramon Martinez, Rodolfo Ramirez and James Caudill.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously come before this Court. Petitioners' undersigned counsel is not aware of any other related case pending before this Court.

IDENTITY OF DEFENSE COUNSEL BELOW

Petitioner Ramon Martinez was represented at trial by attorney Joseph A. Connors III.

Petitioner Rodolfo Ramirez was represented at trial by attorney L. Aaron Pena.

On appeal, Mr. Connors represented both Petitioners.

TABLE OF CONTENTS

	Page
FIRST QUESTION PRESENTED FOR REVIEW . .	i
SECOND QUESTION PRESENTED FOR REVIEW .	ii
LIST OF ALL PARTIES BELOW	iv
STATEMENT OF RELATED CASES AND PROCEEDINGS	iv
IDENTITY OF DEFENSE COUNSEL BELOW . . .	iv
THIS TABLE OF CONTENTS	v
TABLE OF AUTHORITIES	vi
Cases	vi
United States Constitution . .	vi
United States Statutes	vii
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED . .	2
STATEMENT OF THE CASE	2
A. Appeal Court's Jurisdiction .	2
B. Procedural History In District Court	3
C. Statement Of Facts	3
SUMMARY OF ARGUMENT ON REASON FOR REVIEW	7
ARGUMENT ON QUESTION ONE	8
ARGUMENT ON QUESTION TWO	12
CONCLUSION	21

TABLE OF AUTHORITIES

Page

Cases

Cheek v. U.S., 498 U.S. ____,
111 S.Ct. 604,
112 L.Ed.2d 617 (1991) 10

Cool v. U.S., 409 U.S. 100,
93 S.Ct. 355,
34 L.Ed.2d 335 (1972) 11, 12

Giglio v. U.S., 405 U.S. 150,
92 S.Ct. 763,
31 L.Ed.2d 104
(1972) . . . . . ii, 14-19

Mathews v. U.S., 485 U.S. 58, 62,
108 S.Ct. 883,
99 L.Ed.2d 54 (1988) 10

U.S. v. Agurs, 427 U.S. 97,
96 S.Ct. 2392,
49 L.Ed.2d 342 (1976) 15

U.S. v. Bagley, 473 U.S. 667,
105 S.Ct. 3375,
87 L.Ed.2d 481 (1985) 16

United States v. Martinez, Ramirez and
Caudell, No. 92-7046 1

United States Constitution

Fifth Amendment 2, 15, 16

United States Statutes

18 U.S.C.
1001 19
1956 19

28 U.S.C.
1254(1) 2
1291 2

F.R.Cr.P.
30 i

Supreme Court Rule
10.1(a) 7

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

RAMON MARTINEZ AND RODOLFO RAMIREZ,
PETITIONERS

v.

THE UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

To the Honorable Supreme Court:

RAMON MARTINEZ AND RODOLFO RAMIREZ petition for review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

On September 20, 1993, the United States Court of Appeals for the Fifth Circuit entered its opinion affirming the judgments of conviction in this case. United States v. Martinez, Ramirez and Caudell, No. 92-7046. This opinion is unreported (Pet.App. 3-25).

JURISDICTION

On September 20, 1993, the United States Court of Appeals for the Fifth Circuit entered its opinion affirming the judgment of conviction in this case. On October 20, 1993, that appeals court denied Ramon Martinez and Rodolfo Ramirez first motion for rehearing (Pet.App. 26-27).

Jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall ... be deprived of life, liberty, or property, without due process of law; ....

STATEMENT OF THE CASE

A. Appeal Court's Jurisdiction

The Court of Appeals had jurisdiction of petitioner's direct appeal by virtue of 28 U.S.C. 1291.

B. Procedural History In District Court

The petitioners, Ramon Martinez and Rodolfo Ramirez were convicted by a jury of conspiracy with intent to distribute marijuana and marijuana possession with intent to distribute. The district court sentenced petitioner Martinez to 97 months in the custody of the United States Bureau of Prisons, a three year supervised release and a $100.00 special assessment. The district court sentenced petitioner Ramirez to 70 months in the custody of the United States Bureau of Prisons, a three year supervised release and a $100.00 special assessment.

C. Statement Of Facts

Ramon Martinez (Martinez), Rodolfo Ramirez (Ramirez), James Caudill (Caudill), and seven others were indicted for conspiracy with intent to distribute marijuana and possession with intent to began on February 1, 1991, and the possession took place on February 8, 1991. The object of the

conspiracy was to transport marijuana in truckloads of produce.

The Government acknowledges that the case against the three defendants was based primarily on the testimony of their coconspirator Javier Guerra (Guerra). Guerra pleaded guilty to the possession count of the indictment and agreed to cooperate fully with the Government. Most of the facts of the case come from Guerra's testimony.

Felix Ramirez (Felix) and Benigno Olvera (Olvera) were running a marijuana smuggling operation. Ramirez and Caudill worked for Felix and Olvera. In January 1991, 1,200 pounds of marijuana was delivered to Guerra's mobile home where it was to be hidden in a secret compartment. Guerra and others wrapped the marijuana in plastic wrap. The marijuana was transferred from Guerra's mobile home to a location in Elsa, Texas, by Caudill. From there, it was placed into a white tractor trailer truck belonging to

Cheetah Truck Lines. Caudill drove the tractor trailer truck and the marijuana to Tampa, Florida. Guerra and Felix followed the truck to Houston and then flew to Tampa, where they met Caudill. The marijuana was then unloaded from the tractor trailer into another vehicle by Guerra, Ramirez, and others.

A second load of marijuana stored at Guerra's mobile home was to be hauled to Florida by Caudill. However, the exchange did not take place. Caudill told Guerra that his shed had been raided by the authorities and that Guerra was to wait for further instructions. Subsequently, Guerra was introduced to defendant Martinez by Felix and Olvera. Martinez was to transport the marijuana to Florida. The marijuana was transferred to Radco Farms where Guerra loaded it onto Martinez's tractor trailer truck. Martinez witnessed the loading and Guerra testified that Martinez knew that it

was marijuana.

The marijuana was packed in cabbage boxes. Guerra gave Martinez a bill of lading showing 140 empty boxes. Martinez objected stating that if he was stopped the police would want to know why he was carrying 140 empty boxes. Guerra then took the bill of lading back to his house where he met defendant Ramirez, Felix, and Olvera. Felix and Olvera took the bill of lading to have it changed and Ramirez and Guerra went to the Dairy Queen to wait for them to return.

Felix and Olvera changed the bill of lading and gave it to Martinez and met the other two at the Dairy Queen. When Martinez drove by the Dairy Queen, Ramirez and Guerra followed him in Ramirez's brown two-tone Grand Prix. They were to follow Martinez to Houston, but Martinez was pulled over in San Manuel. With the aid of a drug-sniffing dog, the marijuana was discovered.

In April or May 1991, a third load of

marijuana was driven from Texas to New York by Caudill. Guerra and Ramirez assisted in the loaded and unloading of the marijuana.

Martinez, Ramirez, and Caudill were tried before a jury. All three defendants were convicted on both counts of the indictment. Martinez was sentenced to 97 months of imprisonment on each count with the terms to run concurrently. Ramirez was sentenced to 70 months of imprisonment on each count of the indictment with the terms to run concurrently. Caudill was sentenced to 140 months of imprisonment on each count, both terms to also run concurrently. Martinez, Ramirez, and Caudill all timely filed notices of appeal.

SUMMARY OF ARGUMENT ON REASON FOR REVIEW

Under Supreme Court Rule 10.1(a), the Supreme Court should exercise its judicial discretion and allow the writ in this case because the Fifth Circuit Court of Appeals has so far departed from the accepted and

usual course of judicial proceedings.

ARGUMENT ON QUESTION ONE

In their rehearing point of error no. 5, petitioners complained of the court of appeals' denying them due process in resolving their point of error no. 11, which read (Pet.App. 97):

> The district court abused its discretion in refusing to give Mr. Martinez and Mr. Ramirez requested jury instruction as to the method of proving knowledge.

On rehearing, petitioners argued (Pet.App. 87-89):

> The Court of Appeals finds (Opinion at p. 11):
>
> > Taking the district court's instruction together with counsel's argument shows that the defense was adequately submitted to the jury. Ramirez-Rizo, 809 F.2d at 1071-72.
>
> Appellants Martinez and Ramirez submit that it is a denial of due process on appeal for the appellate court to find the trial court's instructions together with counsel's argument show that the defense of no knowledge was adequately submitted to the jury

and either no harm occurred or harmless error occurred when the trial court refused to submit proper jury "knowledge" instructions requested by appellant Martinez and concurred in by appellant Ramirez. Since the jury only receives the applicable law from the court, appellants were denied due process in the trial court when the trial judge failed to instruct the jury as requested in appellant Martinez' requested jury instruction as to the method of proving knowledge.

Appellants conclude that it is a violation of due process for the trial judge to deny proper jury instructions and for the appellate court to say there is no error because the defense lawyer argued that same law which the judge omitted from instructing the jury on. Appellant recognizes that this panel of the Court of Appeals must follow prior precedent. So unless this case is taken en banc, this panel will likely follow prior precedent, unless the constitutional problem remains unaddressed by prior circuit precedent. Compare United States v. Fooladi, 746 F.2d 1027, 1031-32 (CA5 1984), cert. denied, 470 U.S. 1006, 105 S.Ct. 1362, 84 L.Ed.2d 382 (1985) [where the district court erred in not instructing on a defensive theory, for the trial judge's imprimatur on a defensive theory is important; but the defendant's "conviction was saved by circumstance that his case was fully developed and argued to the

jury--ironically because he was well defended"].

Petitioners here renew those above arguments and call the Court's attention to the following three cases which demonstrate how important jury instructions are to the validity of the jury's convictions here.

In Mathews v. U.S., 485 U.S. 58, 62, 108 S.Ct. 883, 886, 99 L.Ed.2d 54 (1988), the Court reversed the Court of Appeals and remanded to that court holding "that even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment." The Court added:

> As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor.

Id., 485 U.S. at 63, 108 S.Ct. at 887.

In Cheek v. U.S., 498 U.S. ____, 111 S.Ct. 604, 611, 613, 112 L.Ed.2d 617 (1991),

the Court held that it was error for the district court to instruct the jury in determining whether Cheek had acted willfully, to disregard evidence of Cheek's asserted beliefs and understanding that, within the meaning of the Internal Revenue Code, he was not a taxpayer nor a person required to file a return or to pay income taxes and that wages are not taxable income.

In Cool v. U.S., 409 U.S. 100, 93 S.Ct. 355, 34 L.Ed.2d 335 (1972), the Court reversed the conviction and remanded the cause because the clear implication of the trial court's instruction was that the jury should disregard defense accomplice witness Voyles' testimony unless the jury was "convinced it is true beyond a reasonable doubt." That instruction had the effect of substantially reducing the Government's burden of proof and the constitutionally rooted presumption of innocence. "Such an instruction places an improper burden on the

defense and allows the jury to convict despite its failure to find guilt beyond a reasonable doubt." Id., 409 U.S. at 102-103, 93 S.Ct. 356.

Thus, petitioners' convictions should be reversed for the trial court reversibly erred in not instructing the jury as requested in Defendant's Requested Jury Instruction numbered as follows by its respective page eight (Pet.App. 70-73). The jury was judicially deprived of that essential information needed to make a proper decision on whether or not petitioners knowingly possessed the marijuana. In rejecting this contention the Court of Appeals reversibly erred.

ARGUMENT ON QUESTION TWO

As to the instructions not given to the jury, the court of appeals resolved those issues against petitioners (Pet.App. 18-23). In rehearing point of error no. 4, petitioners complained (Pet.App. 85-86):

> As to points of error nos. 7 through 9 and 13, the Court fails to deal with appellants' contention that those requested jury instructions dealt with law issues the jury needed to know to accurately analyze Javier Guerra's credibility based on the full consequences of all the deal Guerra received by cooperating with the Government. Compare Opinion at pgs. 12-13.

Thereunder, petitioners argued (Pet.App. 101-102):

> In their brief appellants argued at pgs. 47-48:
>
> > Since there was little other substantive evidence other than Javier Guerra's testimony to prove Mr. Martinez's or Mr. Ramirez's guilt, it was imperative that they be allowed the opportunity to dispute the credibility of Javier Guerra. Mr. Guerra lied to agent Gonzalez on more than one occasion. The jury had every right to know that lying to a federal officer was a federal offense, and Mr. Guerra was not so charged by the Government because the Government chose not to charge him. The jury also had every right to

> know that Mr. Guerra was also guilty of the offense of money laundering and that he was not so charged because the Government chose not to charge him. The jury also had every right to know about what kind of sentence Mr. Guerra was avoiding by pleading guilty and assisting the Government in his "testimony". All this had a bearing on Javier Guerra's credibility to show any motive Mr. Guerra had to lie, and the jury had every right to know that there was plenty to lie about.

Although requested and their omission objected to (Pet.App. 74-80, 50-52), the trial court failed to so instruct the jury on all the law relevant to weigh the credibility of accomplice Javier Guerra. Thus the jury did not receive the truth about the Government's entire "deal" with Javier Guerra. Reversible error results when Governmental promises of leniency to a government witness are not disclosed to the jury. Giglio v. U.S., 405 U.S. 152, 92 S.Ct.

763, 31 L.Ed.2d 104 (1972). In fact, the trial court had prohibited defense counsel from going into some of those areas on opening statement (7R 30-31) (which matter was a subject of petitioners' rehearing point of error no. 2; Pet.App. 82-85) and prohibited defense counsel from going into some of those areas on cross-examination of Javier Guerra (9R 376-379; 387-392; 404-409) (which matter was the subject of petitioners' brief point of error no. 4; Pet.App. 92-95).

In resolving this issue the Court's attention is called to the following three cases which are applicable here by implication and as a foundation upon which to build herein.

"We are dealing with the defendant's right to a fair trial mandated by the Due Process Clause of the Fifth Amendment to the Constitution." U.S. v. Agurs, 427 U.S. 97, 107, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342 (1976)[where in the context of the entire

record, the Court held that the prosecutor's failure to tender Sewell's prior record to the defense did not deprive respondent of a fair trial as guaranteed by the Due Process Clause of the Fifth Amendment].

In U.S. v. Bagley, 473 U.S. 667, 684, 105 S.Ct. 3375, 3385, 87 L.Ed.2d 481 (1985), the Court reversed the judgment of the court of appeals and remanded the case to that court for a determination whether there is a reasonable probability that, had the inducement offered by the Government to O'Connor and Mitchell been disclosed to the defense, the result of the trial would have been different.

In Giglio v. U.S., 405 U.S. 150, 153-155, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972), the Court said:

> As long ago as Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice."

This was reaffirmed in Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942). In Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), we said, "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Id., at 269, 79 S.Ct., at 1177. Thereafter Brady v. Maryland, 373 U.S., at 87, 83 S.Ct., at 1197, held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution." See American Bar Association, Project on Standards for Criminal Justice, Prosecution Function and the Defense Function § 3.11(a). When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within this general rule. Napue, supra, at 269, 79 S.Ct., at 1177. We do not, however, automatically require a new trial whenever "a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . . ." United States v. Keogh, 391 F.2d 138, 148 (CA2 1968). A finding of materiality of the evidence is required under Brady, supra, at 87, 83 S.Ct., at 1196, 10 L.Ed.2d 215. A new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . ." Napue,

supra, at 271, 79 S.Ct., at 1178.

In the circumstances shown by this record, neither DiPaola's authority nor his failure to inform his superiors or his associates is controlling. Moreover, whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government. See Restatement (Second) of Agency § 272. See also American Bar Association, Project on Standards for Criminal Justice, Discovery and Procedure Before Trial § 2.1(d). To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.

Here the Government's case depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.

For these reasons, the due

process requirements enunciated in Napue and the other cases cited earlier require a new trial, and the judgment of conviction is therefore reversed and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Mr. Justice POWELL and Mr. Justice REHNQUIST took no part in the consideration or decision of this case.

Although the jury heard many of the details and the generalities of the Government's "deal" with Javier Guerra, the jury was never informed by the trial court of the applicable law under 18 U.S.C. 1001 and 1956 so the jury would actually know that the Government had agreed not to prosecute Javier Guerra as to certain specific crimes he factually detailed in his testimony. Those crimes included false statements under 18 U.S.C. 1001 and money laundering under 18 U.S.C. 1956. Additionally, the jury was not informed by the Court or the Government as to the potential sentence Javier Guerra was facing under the applicable federal

sentencing guidelines prior to any governmental motion for a downward departure because of substantial cooperation by Javier Guerra. The jury should have been told about all the specific benefits Javier Guerra received from the executive branch of the Government. The jury should also have been informed that through the United States Attorney for the Southern District of Texas, the executive branch of the Government has the exclusive right to decide whom to seek charges against and to prosecute and to bring to trial for alleged involvement in criminal conduct. Thus, the trial court reversibly erred in not granting Defendant's Second Request Instructions numbered as follows by their respective pages three, four, five, and six (Pet.App. 74, 77-80). The jury was judicially deprived of that essential information needed to make a proper decision on whether or not Javier Guerra was credible when he said that petitioners knowingly

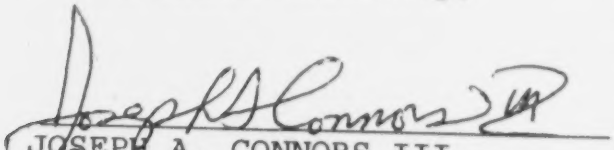
conspired to possess the marijuana and knowingly possessed the marijuana. In rejecting this contention the Court of Appeals reversibly erred.

CONCLUSION

For the foregoing compelling reasons, this Court should grant this petition for writ of certiorari, and reverse the convictions and remand this case to the Court of Appeals with instructions.

DATED: January 18, 1994.

Respectfully submitted by
Petitioners' Attorney,



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